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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 205

JOHN HARRY BRUNO, *Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

BRIEF FOR RESPONDENT

On Writ of Certiorari to the Supreme Court of Pennsylvania, Eastern District.

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether a defendant who is mentally ill, does not have sufficient ability to consult with his counsel with a reasonable degree of rational understanding, does not have a rational and factual understanding of the proceedings flowing from the criminal charges lodged against him, can receive a fair trial at the present time?

COUNTER-STATEMENT OF THE CASE

The defendant was born in Norristown, Pennsylvania, on September 19, 1937, to Charles and Agnes Bruno. He was raised in the Norristown area.

For five years prior to the defendant finishing the ninth grade his mother was committed to the Norristown State Hospital for a mental disorder. In 1953, the defendant left school in order to care for his mother which he did for approximately seven years.

Apparently, during this seven year period the defendant was suffering from chronic paranoid schizophrenia and as a symptom of this illness he had delusions characterized by ideas of voodoo, witchcraft, evil eye etc.

Sometime before November 1960, the defendant gave to one William E. Shainline a certain writing which contained a list of seven names[1] and addresses of persons who he believed to be witches possessed of occult powers.

The defendant requested Shainline, whom he referred to as a "white witch" to counter act the "black witches."

At the same time, he also delivered to Shainline another writing which described the aforementioned persons as "a gang of dangerous criminals" and "these wicked, dangerous, jealous, treacherous criminals" who had given the defendant's people nothing but trouble. He stated that they all deserved to die; that they were still bothering innocent people; that they are supernatural enemies and that no one has been able to stop and defeat these enemies who have been bothering the defendant's family for eight years and are still doing so, and that he considers it time for revenge.

On November 21, 1960, the defendant was inducted into the United States Army. On December 14, 1960, after only three and one half weeks of service, he was admitted to the Irwin United States Army Hospital at Fort Riley, Kansas, having been referred there by his Dispensary Surgeon. The reason for the referral was that he had com-

[1] Frances and Tony Scoma, Catherine and Joseph Licata, Pauline and Octayia Perricone and Tony Venezia.

plained of being "hexed by witches" as a result of which he was unable to learn anything in basic training.

The defendant remained in this hospital one week and then was transferred to Fitzsimons General Hospital, Denver, Colorado, closed psychiatric ward on December 21, 1960.

The clinical record in the Medical Board Proceeding on page 34 sets forth the following:

> "On arrival at Fitzsimons the patient (the defendant) presented as a short, fairly stocky male who was eager to come to the interview. He has marked acne of the face, but in general quite friendly, pleasant and cooperative. He began verbalizing spontaneously with rapid pressurized speech which became progressively louder as he spoke and which was extremely paranoid in nature and content. He repeated and rephrased everything he stated many times in a very obsessive and paranoid manner. There was marked ideas of reference and ideas of influence in respect that he had certain witchcraft powers and that he was certain he was under the hex of witches from his home town. In addition, a marked thought disorder was apparent in that there was flight loosening of associations and flattened affect. He was able to describe auditory and visual hallucinations in which he had seen his mother rise from her bed unaided up to the ceiling. On frequent intervals he stated he was in active communication with witches."

The Medical Board Proceedings further disclose, page 32, that the patient had the following medical conditions:

> "Pschizophrenic reaction, paranoid type, chronic severe; manifested by paranoid delusions, halfucinations, flight of ideas of influence and flattened affect; predisposition, moderate, longitudinal Schizoid adjustment and evidence of previous psychotic symptoms; precipitating stress, minimal."

The Physical Evaluation Board Proceedings, page 51, discloses that the final diagnosis of the Defendant was:

> "Schizophrenic reaction, paranoid type, chronic, severe. Degree of impairment, marked for further military duty. Improved, in partial remission."

The degree of severity is given as follows:

> "Productive of definite impairment of social and industrial adaptability."

The Statement of Conclusions dated April 28, 1961, of the Physical Evaluation Board, page 3, is as follows:

> "The Board found the patient medically unfit for further military service under the provisions of Par 3-32, AR 40-501. The Board considered that the Medical Board Proceedings supported the fact that this psychotic condition existed prior to patient's entry on active military service, and is therefore Line of Duty: No."

In May of 1961, the defendant was discharged from the United States Army. He returned to Norristown to live. In June of the same year, the defendant stole a .22 caliber revolver from a local store and hid it in his bedroom.

In October 1961, the defendant began his methodical execution over a period of five years of the persons he believed had placed an "evil eye" spell upon himself and his family. On the evening of October 20, 1961, the defendant entered the home of Joseph Licata and Catherine, his wife, through an unlocked door and shot Joseph Licata several times in the stomach as he sat in a living room chair. Mrs. Licata, who was in the cellar, upon hearing the shots came to investigate and was shot by the defendant in the back. The defendant shot his victims in the head after they had collapsed to insure they were dead.

On the evening of December 21, 1963, the defendant entered Anthony S. Scoma's home while his wife Frances was absent and shot Mr. Scoma in the back once as he sat

in his kitchen. Mr. Scoma stood up and then collapsed dead. The defendant then proceeded to shoot the victim three more times in the head.

On the evening of April 23, 1966, the defendant went to the home of Octavia Perricone and Pauline, his wife. The front door was opened by the Perricones, both were near the door when the defendant entered. The defendant shot Mrs. Perricone first after which she ran to a bedroom and collapsed dead. The defendant then shot at Mr. Perricone but missed whereupon Mr. Perricone unsheathed a stiletto type knife he had in his cane and cut the defendant on the side of the face.

As Mr. Perricone was backing up trying to escape through the rear door of the house, the defendant shot him several times after which he collapsed dead. The defendant reloaded his revolver and shot both of his victims again in the head.

On April 26, 1966, the defendant and his father were taken into custody for investigation. A search of the defendant's bedroom produced a .22 caliber revolver hidden under his bed which was later identified by a ballistic expert as being the murder weapon. While in custody the defendant stated he had methodically executed the five victims in order to free himself and his family from the "evil eye" spell they had placed upon them.

During the course of the defendant's statement, the District Attorney concluded that the defendant suffered from some type of mental aberration. He did not consider himself competent to adjudicate the question of whether or not the defendant was insane at the time of the commission of the several murders of which he stood charged, nor whether or not he was competent to confer intelligently and rationally with counsel or to stand trial. Accordingly, the District Attorney concluded that the defendant was a fit and proper subject for a probing and definitive mental examination by a Sanity Commission pursuant to the provisions of Section 344 and 345 of the Pennsylvania Mental Health Act of 1951, as amended, 50 PS Section 1202.

On April 27, 1966, the defendant was arraigned and charged with the aforementioned five killings as well as other related offenses. The Preliminary Hearing was held on May 4, 1966. At the conclusion of the Commonwealth's case, the defendant elected not to testify or to call any witnesses in his behalf. Thereupon, the defendant was committed to await the action of the next session of the Grand Jury to be convened Tuesday, May 31, 1966.

On May 13, 1966, the District Attorney filed a Petition for the appointment of a Sanity Commission in accordance with the Mental Health Act. The defendant's attorney filed a Motion to Dismiss the Petition for Appointment of a Sanity Commission. On June 2, 1966, the Grand Jury returned the several bills of indictment as "approved" including five bills of indictment charging the defendant with murder. On July 6, 1966, after argument, the Criminal Court of Montgomery County entered an Order dismissing the Defendant's Motion to Dismiss and by separate Order appointed a Sanity Commission consisting of two highly qualified psychiatrists and an outstanding and respected member of the Montgomery County Bar Association. The defendant appealed to the Supreme Court of Pennsylvania which quashed the appeal without prejudice as being premature.

The Sanity Commission held hearings on March 29, 1967, April 17 and 18, 1967. The defendant was present along with his attorney and the District Attorney and his witnesses.

The Sanity Commission filed its report on June 8, 1967, and came to the following conclusion:

> "The defendant, John Harry Bruno, is mentally ill as defined by the "Mental Health Act of 1951" wherein "mental illness" is defined as "an illness which so lessens his capacity to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care." The

defendant, in the opinion of the Commission, is now and has been in the past suffering from chronic paranoid schizophrenia which has existed for a number of years. As a part of this illness he has a delusional system characterized by ideas of voodoo, witchcraft, evil eye etc., which has and still does dominate his thinking and his behavior. The Commission concludes that the defendant is mentally ill and that he requires care in a mental hospital.

"The defendant is of criminal tendency and will continue to be so, this tendency stemming from his mental illness, as shown by his belief that only by eliminating suspected people can he and his family be protected. He indicates that if no relief is forthcoming after the elimination of certain suspected persons he will have to seek other suspects. His criminal tendency has been evidenced by a tendency to repeat offenses against the law, as admitted by him.

"The defendant does not have a sufficient present ability to consult with his counsel with a reasonable degree of rational understanding, nor does he have a rational and factual understanding of the proceedings flowing from the criminal charges lodged against him. This conclusion is based on the fact that his delusional content is irrational and since his problem revolves about this aspect of his thinking, he cannot consult rationally with anyone about it or discuss it in a rational manner; and it follows from all of this that he is not capable of standing trial for the offenses of which he stands accused."

On June 12, 1967, based on the Sanity Commission's report, the court concluded that:

"The defendant, John Harry Bruno, is mentally ill, is of criminal tendency, requires care in a mental hospital, does not have sufficient present ability to consult with his counsel with a reasonable degree of

rational understanding, and does not have a rational and factual understanding of the proceedings flowing from the criminal charges lodged against him."

On June 30, 1967, the Montgomery County Courts committed the defendant to Farview State Hospital to be detained and treated as a mentally ill or mentally defective person.

On July 3, 1967, the defendant petitioned for a Writ of Habeas Corpus which was dismissed by the Montgomery County Court.

The defendant appealed to the Supreme Court of Pennsylvania. The matter was argued and reargued and on July 10, 1969, the Supreme Court of Pennsylvania affirmed the lower court's order.

The defendant filed with this Court a Petition for Writ of Certiorari to the Supreme Court of Pennsylvania. The Writ was granted. Hence this brief.

SUMMARY OF ARGUMENT

To bring the defendant to trial while he is legally incompetent violates the due process clause and, furthermore, the defendant should not be allowed to place himself in such a position, a position which he could use after conviction in support of a Motion for New Trial.

ARGUMENT

The primary question presented in this appeal is whether a defendant who is mentally ill, who does not have sufficient ability to consult with his counsel with a reasonable degree of rational understanding, and who does not have a rational and factual understanding of the proceedings flowing from the criminal charges lodged against him, can receive a speedy as well as a fair trial?[1]

This court held over a decade ago that a conviction of an accused person while he is legally incompetent violates due process and that state proceedings must be adequate to protect this right: *Bishop v. United States*, 350 U.S. 961 (1956).

Pate v. Robinson, 383 U.S. 375 (1966), held that not only does it not violate the United States Constitution to direct a mental examination of an accused, but that such a proceeding is necessary under the due process clause.[2]

The Supreme Court of Illinois was reversed on the grounds that the record reflected that the defendant should have been afforded a hearing on the issue of his competency to stand trial despite the fact that there was no request by the defendant or his counsel for such a hearing.

Here the defendant's counsel refuses or waives a sanity commission investigation into the defendant's sanity. If it is contradictory to "argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial,"[3] certainly it can not now be argued by the defendant that he can make a knowing and intelligent decision

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[1] See *Dusky v. United States*, 362 U.S. 402 (1960).

[2] See also *Zachery v. Hale*, 286 F. Supp. 237 (1968); *Lee v. State of Alabama*, 386 F. 2d 97 (1967); *Sanders v. Allen*, 100 F. 2d 717 (1938); *United States v. Chisolm*, 149 F. 284 (S.D. Ala. 1906); *Youtsey v. United States*, 97 F. 937 (6th Cir. 1899).

[3] *Pate v. Robinson*, 383 U.S. 375, 384 (1966); *Taylor v. United States*, 282 F. 2d 16 (8th Cir. 1960).

to proceed to trial under such a disability. As Justice Pomeroy stated in his concurring opinion on page three, "there is a danger, it seems to me, of confusing zealous and able counsel with the client in a case of this sort."

If the defendant's request for relief was granted and he was brought to trial and a conviction resulted, he would have placed himself in the position where an allegation that he was denied due process and a fair trial could be raised. The defendant's attorney states that he is not *presently* raising an insanity defense, but on appeal from a conviction, with possibly another defense counsel, as those matters all too often develop, the aforementioned allegations could be raised.

Justice Pomeroy in his concurring opinion stated on page 6 the following:

> "It does not follow, however, that a person in such an unfortunate position should be able to demand, on the one hand, a *speedy* trial and if his request is granted and conviction results, to charge, on the other hand, that he was denied a *fair* trial because he was tried when he was incompetent to defend himself."

To bring such a person to trial invites the characterization of "travesty": *Commonwealth v. Ragone*, 317 Pa. 113 (1935).

In the instant case, unlike that of *Pate v. Robinson*, supra, the District Attorney has brought the competency of the defendant to the attention of the court, although such a fact appears irrelevant, the important fact being the mental competency of the defendant regardless of who brings the issue before the court.

The mental competence of an accused must be regarded as an absolute and basic condition of a fair trial. True the defendant is entitled to a speedy trial but such a right is not absolute; it means speedy under the circumstances. In *United States v. Ewell*, 383 U.S. 116 (1966), this court held that:

> "The right of a speedy trial is necessarily relative. It is consistent with delays and depends on circumstances. It secures rights to a defendant. It does not preclude the rights of public justice . . . whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances . . . the delay must not be purposeful or oppressive . . . the essential ingredient is orderly expedition, and not mere speed."[4]

The right to a speedy trial is modified by the right to a fair trial. Certainly, to bring a defendant to trial within a few days of his arrest would be a speedy trial but not fair since he would be unable to adequately prepare his defense. The United States Constitution's guarantee of a speedy trial does not require that an incompetent defendant be tried. *United States ex rel. Thomas v. Pate*, 351 F.2d 910 (7th Cir. 1965), cert. denied 383 U.S. 962 (1966); *Howard v. United States*, 261 F.2d 729 (5th Cir. 1958); *United States v. Miller*, 131 F. Supp. 88 (D. Vt. 1955); *State v. Violett*, 111 N.W. 2d 598 (S.D. 1961).

The Supreme Court of Rhode Island decided a case remarkably similar to this one in *State v. Cook*, 244 A. 2d 833 (1968). There the defendant, who was charged with murder, had been found incompetent to stand trial in 1960. He was committed to the criminal insane ward of the Rhode Island Medical Center. In 1966, *on defense counsel's motion*, a hearing was held on his competency to proceed to trial. He was found to be mentally unfit. A new hearing was held six months later *on the defendant's motion* to assign the case for trial. The motion was denied and an appeal taken from the decision in the second hearing. The Opinion of the Rhode Island Supreme Court reads in part as follows:

> "From early times in England, it has been clear that persons who are found to be insane were never

[4] See also *Hodges v. United States*, 408 F. 2d 543, 549 (8th Cir. 1969).

put on trial until their infirmity had dissipated. This humane view is so deeply embedded in our criminal jurisprudence that if a man is tried today while suffering from a decomposed mentality, it is regarded as violative of his constitutional rights of due process See *Pate v. Robinson*, 383 U.S. 375; 86 S. Ct. 836, 15 L. Ed. 2d 815; *People v. Bender*, 20 Ill. 2d 45, 169 N.E. 2d 328. *Unquestionably the mental competence of an accused must be regarded as an absolute basic condition of a fair trial.* (834, 835).

"To identify more clearly the elements of the test for competency to stand trial, it is helpful to acquaint oneself with the historical functions sought to be achieved by its application. The rule is said to protect the accused rather than the public, but *it is applied even in cases where the defendant importunes the court for a trial.* See *Commonwealth v. Ragone*, 317 Pa. 113; 176 A. 454. The true reason why a mentally disabled defendant should not be tried is said to be that his infirmity substantially prevents him from modeling a just defense to the claims brought against him indeed if such a defense he has. At common law, therefore, if a man were shown to have lost his mental equilibrium, he was presumed to be incapable of putting forth a rational defense and moreover, with regard to punishment he was reprieved for the reason that to use Blackstone's phraseology, *'furiosus solo furore punitur'* (a lunatic is punished by his madness). 2 Sharswood's Blackstone's Commentaries, Book IV, Chap. 31, p. 608.

"Concern over providing humane treatment to an accused as well as preserving fundamental fairness and integrity, which should always be the hallmark of judicial administration in an ordered society, have prompted courts in this country to be increasingly scrupulous in shielding defendants with mental defects from being prosecuted. The mere thought of requiring a man to defend against criminal accusa-

tions when he suffers from an impaired mental faculty, jars and disturbs our conscience and sense of civilty . . .

"For these reasons, therefore, the rule has developed that whenever a defendant's mental capacity is questioned, he is constitutionally entitled to a meaningful hearing designed to determine his fitness for trial. See *Pate v. Robinson*, supra. . . .

". . . Certainly no one could argue with much conviction that a man who fails to comprehend the true nature of criminal proceedings brought against him can be of much assistance to his counsel in their joint effort to forge a defense to the charges against him. Moreover, all the other constitutional privileges, such as the right to counsel, the right to confront opposing witnesses, the right not to testify and the right to a speedy *trial*, would indeed be hollow and worthless safeguards to one who did not possess sufficient mental aptitude to understand the nature of his trial or his relationship to it. See note, 81 Marv. L.R. 454, Incompetency to Stand Trial." (emphasis supplied)

There is a plethora of cases which cite *Pate v. Robinson*, supra, as authority on this issue. Among those of interest are *Zachery v. Hale*, 286 Fed. Supp. 237; *Townsend v. State*, Tex. Ct. Crim. App. 4/24/68, 3 Crim. Law Rep. 2191; *U.S. v. Boltik*, U.S. Navy Bd. Rev. 9/5/68, 4 Crim. Law Rep. 2038; *In re Harmon*, 7 Crim. Law Rep. 2185, 5/6/70.

The Act of September 7, 1949, C. 535, section 1, 63 Stat. 686, 18 U.S.C.A. section 4244 provides for the pretrial commitment of mentally incompetent defendants after an examination by at least one psychiatrist and a subsequent hearing. The procedure set forth in the aforementioned act is remarkably similar to the procedure followed in the instant case under the Pennsylvania Mental Health

Act, as well as the conditions of the examination and hearing.

It has been held on numerous occasions that it is not a denial of a speedy trial not to bring a mentally incompetent defendant to trial during his incompetency. In *Howard v. United States*, supra, the Court of Appeals held that a defendant who was indicted for transporting a stolen vehicle from the United States to Mexico and who was found to be mentally incompetent and incapable of standing trial and who was committed to the custody of the Attorney General under 18 U.S.C.A. 4244-4248 and who was confined in the Federal Medical Center at Springfield, Missouri, was not denied the right to a speedy trial as guaranteed by the Federal Constitution. The Court went on to hold that the constitutionality of the aforementioned statute has been upheld in *Greenwood v. United States*, 350 U.S. 366; and *United States v. Miller*, supra.

In *Greenwood v. United States*, supra, as stated above, the constitutionality of 18 U.S.C.A. 4244-4248 was upheld. The factual situation was similar to the present case. On pages 374 and 375 this court held:

> ". . . obviously in such case there should be authority in the court to cause the confinement of the accused in a mental hospital . . .
>
> "We reach then the narrow constitutional issue raised by the order of commitment in the circumstances of this case. The petitioner came legally into the custody of the United States. The power that put him into such custody—the power to prosecute for federal offenses—is not exhausted. Its assertion in the form of the pending indictment persists. The District Court has found that the accused is mentally incompetent to stand trial at the present time and that, if released, he would probably endanger the officers, property, or other interests of the United States—and these findings are adequately supported. In these circumstances the District Court has entered an order retaining and restraining petitioner, while

in his present condition, with habeas corpus always available when circumstances warrant. This commitment, and therefore the legislation authorizing commitment in the context of this case, involve an assertion of authority, duly guarded, auxiliary to incontestable rational power. As such it is plainly within congressional power under the Necessary and Proper Clause. Art. I, section 8, cl. 18."

The Supreme Court of Rhode Island held in *Genereux v. Pelosi*, 192 A.2d 630, 633 (1963),[5] the following:

"Since it is seldom that an accused who is mentally incompetent to stand trial takes the initiative to demand a trial, the reported litigation on the issue with which we are concerned is not extensive. Foote, 'A Comment On Pre-Trial Commitment of Criminal Defendants,' 108 U. Pa. L. Rev. 832, 834. Whatever authorities we have found, however, support the view we have taken as to the limitations on the application of section 12-13-7.

"The issue though previously considered by this court was not determined by us. *Sevigny v. Langlois*, R. I., 179 A.2d 496.

"The federal statutes providing for pretrial commitment are found in 18 U.S.C.A., sections 4244-48. The relevant portions provide in substance a procedure for determining mental incompetency during the period after arrest and prior to imposition of sentence. In such instance the commitment continues until restoration of sanity or until the mental condition of the person committed is so improved that if released he will not endanger the safety of the officers, the property, or other interests of the United States."

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[5] See also *United States v. Davis*, 365 F. 2d 251 (A. Tenn. 1966); *United States v. Miller*, supra; *Parks v. Commonwealth*, 424 S.W. 2d 133 (1968).

"A conflict in the inferior federal courts as to the constitutionality of the federal statutes insofar as they allow pre-trial commitment of persons suffering from mental incompetency of extended duration was resolved in *Greenwood v. United States*, 350 U.S. 366, 76 S. Ct. 410, 100 L. Ed. 412, where a pre-trial commitment of approximately two years was held to be without error even though the record showed that the person committed had little likelihood of recovery.

"Article VI of amendments to the Constitution of the United States provides in part as follows: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . .' The Fifth Circuit Court of Appeals in *Howard v. United States*, 261 F.2d 729, relying on *Greenwood* held that the failure to put the accused to trial because of his mental incompetency did not deprive him of the right to a speedy trial under the guarantee of the Sixth Amendment. In *Howard* it was held, therefore, that the word 'accused' in the Sixth Amendment did not include one mentally incompetent to stand trial."

Another constitutional question which was raised by the defendant in the lower courts concerns the applicability of *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Escobedo v. Illinois*, 378 U.S. 478 (1964) to the testimony and evidence received by the Sanity Commission.[6]

The Criminal Courts of Montgomery County have ruled that the statement the defendant gave was constitutionally obtained but, regardless, *Miranda* and *Escobedo* have no application during a Sanity Commission hearing since the purpose of said hearing is to determine the competency of the defendant and not his guilt or innocense. Such a hearing is not criminal in nature: *Commonwealth v. Brown*, 7 Crim. L. Rep. 2166, 4/22/70; *Common-*

[6] This question was not set forth in the defendant's petitions for Writ of Certiorari and therefore under normal circumstances should not be considered by the Court. United States Supreme Court Rule 40(a).

wealth v. Byrd, 421 Pa. 513, cert. denied, 385 U.S. 886 (1966); *Commonwealth v. Ballem*, 391 Pa. 626 (1958); *Commonwealth v. Bechtel*, 384 Pa. 184 (1956); *Commonwealth ex rel. Tate v. Shovlin*, 205 Pa. Superior Ct. 370 (1965); See also *Privilege Against Self-Incrimination Does Not Prevent Compulsory Mental Examination In Criminal Sexual Psychopathy Proceeding:* Ohio S. L. J. 30: 866 Fall 1969.

In *United States v. Wilson*, 5 Crim. L. Rep. 2315, 6/27/69, the U. S. Court of Military Appeals held the following:

> "In our recent decision in *U.S. v. Babbridge*, 5 Cr. L. 2316, No. 21, 628, May 1969, we held that the government's psychiatric examination of an accused pleading insanity, and the conclusions on the sanity issue to which the examining government psychiatrist testifies, are not incriminating and are not 'links in a chain of evidence against the accused.' We held that the accused's opening his mind to a psychiatrist in an attempt to prove insanity constitutes, in the psychiatric examination to which the government is reciprocally entitled, a qualified waiver of the right of silence. *Babbridge* drew heavily on *U.S. v. Albright* 388 F.2d 719, 2 Cr. L. 23882 (CA 4, 1968), which held, as we do, that the purpose of the examination is not to determine whether the defendant did the acts charged, but whether he was mentally responsible. *Albright* further held that a defendant has no Constitutional right to have his attorney present during the prosecution's psychiatric examination and that if defendant's privilege against self-incrimination is given full effect with regard to his inculpatory statements to his examiner, the need for the presence of an attorney is obviated."

The Fifth [*Malloy v. Hogan*, 378 U.S. 1 (1964)] and the Sixth [*Gideon v. Wainwright*, 372 U.S. 335 (1963)] Amendments to the Constitution of the United States have

been held to be applicable to the states through the Fourteenth Amendment. But to consider this bold restatement of constitutional law as being determinative of the legal issues now before your Honorable Court is to over-simplify the questions to be resolved. It is essential to an understanding of the Commission's character and authority that the case law be carefully examined to determine the precise nature of the proceedings before the Commission and to understand their departure from conventional criminal proceedings and the cases to which they are collateral.

The Pennsylvania Appellate Courts have consistently maintained that a sanity commission proceeding is not criminal in character: *Commonwealth v. Anderson*, 211 Pa. Superior Ct. 349 (1967). More than that, it is not even judicial in nature. The only purpose of a sanity commission proceeding is to inform the Court of the mental status of the accused so that it might act in a conscionable fashion in the disposition of the criminal proceedings to which it is adjunct. Both the Superior and Supreme Courts of Pennsylvania have had occasion to consider the nature of a sanity commission proceeding. Though the verbiage and syntax differ slightly, both courts have reached substantially identical conclusions.

In *Commonwealth ex rel. Tate v. Shovlin*, supra, the Quarter Sessions Court of Philadelphia County sent the defendant to the Farview State Hospital following receipt of a report from a sanity commission. The defendant was charged with burglary, larceny, receiving stolen goods and carrying a concealed deadly weapon, but he had not been brought to trial because of his mental condition. More than a year after the commitment, the defendant filed a Petition for a Writ of Habeas Corpus alleging, inter alia, the unconstitutionality of The Mental Health Act of 1951, as amended. Said the unanimous Superior Court at page 374:

> "Relator is not the subject of a criminal prosecution nor is he being subjected to punishment. A proceeding under The Mental Health Act is not a

criminal prosecution but a collateral proceeding to determine the mental condition of the person involved for his benefit and for the benefit of the public, or both."

The Supreme Court of Pennsylvania came to grips with this very issue in *Commonwealth v. Ballem*, supra, and in responding to certain contentions advanced by the defendant, made the following observation at page 633:

> "None of these contentions can be upheld. All of them stem from the false premise or assumption that the inquiry as to defendant's insanity as that term is defined under the 1956 amendment to The Mental Health Act of 1951 is of juridical nature, that is, a proceeding similar to a trial at law. This is not true."

Summarizing, it may be concluded that a collateral proceeding before a sanity commission is not judicial in character, is not a criminal prosecution similar to a trial, and that its responsibility is advisory only. The recommendations of a sanity commission are not obligatory upon the Court. *Commonwealth v. Patskin*, 372 Pa. 402 (1953); *Commonwealth v. Baldassarre*, 399 Pa. 411 (1960).

It being established that a sanity commission proceeding is not a criminal prosecution and that it is not juridical in nature, it follows that constitutional privileges and guarantees operative in criminal proceedings or prosecutions have no application. As is observed in Wharton's Criminal Law and Procedure, 1957, Section 2024, "In a number of states statutes have been adopted providing for the psychiatric examination of a defendant to determine whether he is sufficiently sane to be tried. These statutes have been held constitutional as against the contentions that they constitute improper delegation of power, that the defendant was compelled to incriminate himself by submitting to the examination, that the defendant was thereby deprived of the right to have the jury determine

his sanity, or that the defendant was denied due process of law."

The privilege against self-incrimination does not prohibit the introduction of evidence given by a defendant voluntarily: *Commonwealth v. Butler*, 405 Pa. 36 (1961), cert. denied 368 U.S. 945 (1961), rehearing denied 368 U.S. 972 (1962). It applies only where the oral communication from the defendant is involuntary. In any event, this constitutional guarantee operates only in respect to criminal proceedings, or where it is asserted in anticipation of a criminal proceeding. *U.S. v. Zeid*, 281 F.2d 825 (1960), cert. denied 364 U.S. 901 (1960); *Commonwealth v. Raymond*, 412 Pa. 194 (1963), cert. denied 377 U.S. 999 (1964), rehearing denied 379 U.S. 873 (1964); *Bowles v. Sites*, 62 F. Supp. 773 (1945); *In re Spencer*, 406 P. 2d 33 (1965).

In *Escobedo v. Illinois*, supra, Justice Goldberg, in discussing the application of the Sixth Amendment, was careful to point out in precise and finely delineated language, "That no statement elicited by the police during the interrogation may be used against him *at a criminal trial*." [Italics supplied] 378 U.S. 478, 490-491 (1964).

Chief Justice Warren in *Miranda v. Arizona*, supra, exercised a degree of care commensurate with that of Justice Goldberg and in the opening sentence of the opinion stated:

> "The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence; the restraints society must observe consistent with the Federal Constitution *in prosecuting individuals for crime*." [Italics supplied] 384 U.S. 439 (1966).

Indeed, the entire thrust of Chief Justice Warren's opinion is with respect to criminal prosecutions alone. Every cited case concerns a criminal prosecution in the conventional sense. His historical analysis of the privilege beginning with the Star Chamber trial of John Lilburn in

1637 is directed to criminal proceedings. The dissenting opinions likewise relate only to criminal cases or prosecutions.

In *Commonwealth v. Byrd*, supra, Chief Justice Bell reiterates the above enunciated propositions to the effect that the constitutional immunity from self-incrimination does not apply to a compulsory examination to determine the prisoner's physical or mental condition "*provided he is not compelled to answer any questions propounded to him by those making the examination.*" [Italics supplied] This qualifying stipulation was scrupulously followed in the instant proceeding, and inquiries addressed to John Harry Bruno and his answers were with the express consent and approval of his counsel.

In *Commonwealth v. Moon*, 386 Pa. 205 (1956), the Court was concerned with a case involving a homicide prosecution against a man who shot and fatally wounded the late President Judge Allison D. Wade of the 37th Judicial District. The defendant was indicted, tried and convicted of first degree murder and the penalty was fixed at death.

The Sheriff of Warren County filed a petition for appointment of a sanity commission pursuant to the provisions of The Mental Health Act. A commission was appointed and it subsequently reported *Moon* to be a fit subject for a mental hospital. The lower court rejected the sanity commission's recommendation, and directed that the proceedings continue. The lower court employed the test applicable prior to The Mental Health Act of 1951, and on appeal the Supreme Court of Pennsylvania remanded the matter for further consideration: *Commonwealth v. Moon*, 383 Pa. 18 (1955).

The lower court then fixed a hearing for the taking of additional testimony, and heard from seven employees of the Western State Penitentiary, . . . the warden, the prison physician, and five guards. Thereafter, the lower court again concluded that the defendant was not a fit subject under The Mental Health Act and again directed the matter to proceed.

On the second appeal, the Supreme Court of Pennsylvania affirmed the lower court and repeated its previously stated position at page 211:

> "The controlling factor is the degree or extent to which the mind is affected by the mental disorder and not the bare existence of symptoms which would induce a psychiatrist to diagnose a mental illness . . . ; and that the determinative issue is whether the illness so lessened the defendant's capacity to use his customary self-control, judgment and discretion. . . ."

On the issue of a layman's testifying, the Court observed at page 212:

> "We have repeatedly and invariably held not only the testimony of lay as well as experts is admissible in determining the mental status of a criminal defendant but that all such testimony is for the consideration of the legal tribunal, be it court or jury. . . , 'you do not have to be a psychiatrist to judge whether a man's actions are normal or abnormal. . . .'".

The *Moon* case and the others cited above and *Commonwealth v. Gossard*, 385 Pa. 312 (1956) give added authority to the proposition that a Sanity Commission proceeding is not judicial in character and is not governed by the usual rules of evidence. Voluntary, extra-judicial statements made by the accused of an incriminating nature and without the presence of counsel are permitted. Remoteness of time and circumstances was not a bar to the admissibility of certain evidence provided it was germane to the issue of competency. Opinion evidence in an area usually reserved for qualified experts was expressly approved.

The Mental Health Act of 1951, as amended, 50 P. S. 1071 et seq., provides the criteria by which the commission is to be governed in reaching its ultimate conclusion. Mental illness means an "illness which so lessens the

capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care." The term includes "insanity," "unsoundness of mind," "lunacy," "mental cases", but the term shall not include "mental deficiency," "epilepsy," "inebriety," or "senility," unless "mental illness is superimposed."

A "mental defective" means a "person who is not mentally ill but whose mental development is so retarded that he has not acquired enough self-control, judgment and discretion to manage himself and his affairs, and for whose welfare or that of others care is necessary or advisable." The term shall include "feeble-minded," "moron," "idiot," and "imbecile," but shall not include "mental illness," "inebriate" and "senile."

"Criminal tendency" shall mean "a tendency to repeat offenses against the law or to perpetrate new offenses, as shown by repeated convictions for such offenses or tendency to habitual delinquency."

If the Sanity Commission concludes that the subject matter of its examination is mentally ill or mentally defective, then and in that event, it should recommend the transfer of the prisoner to a mental hospital or an institution for mental defectives. On the other hand, if it is concluded that the subject has a criminal tendency, then the commitment should be to a state hospital for patients convicted or charged with crime and who have criminal tendencies. Section 345, Article III of The Act of June 12, 1951, P. L. 533, as amended, 50 P. S. 1225(d).

Attacks on state statutes providing for the examination of a criminal defendant by experts appointed by the court on the grounds of a violation of the constitutional guarantee against self-incrimination have been uniformly rejected.[7]

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[7] ALABAMA: *Hunt v. Alabama*, 27 So.2d 186 (1946); ARKANSAS: *Hall v. State of Arkansas*, 189 S.W.2d 917 (1945); CALIFORNIA: *People v. Ditson*, 369 P.2d 714 (1962); COLORADO:

A statute authorizing the court to require a criminal defendant to submit to an examination by court-appointed medical experts, such experts to be questioned by the court as to sanity of the defendant, was held not to be unconstitutional as requiring the defendant to testify against himself or depriving the defendant of due process of law or trial by jury. *McVeigh v. State of Florida*, supra.

In *State v. Myers*, supra, the Supreme Court of the State of South Carolina was faced with a situation wherein the defendant was under indictment for murder and his counsel in an *ex parte* proceeding had the defendant removed to a veterans' hospital for a series of tests. Thereafter the State, over the objection of defense counsel, obtained an order for an examination of the defendant at a state hospital. The appeal was from that order of the lower court and rested upon the grounds that constitutional guarantees against self-incrimination preclude the same. At page 508, the unanimous court stated:

> "It would be an anomaly to say that he may advance such a claim and have himself examined by experts of his own choosing and then invoke the constitutional guarantees now asserted for the purpose of preventing a similar examination by authorities of a state hospital."

The Court went on to observe that,

> ". . . the accused is not required to undergo a mental examination for the purpose of establishing

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Wymer v. People, 160 P.2d 987 (1945); DELAWARE: *State v. Mulrine*, 183 A.2d 831 (1962); FLORIDA: *McVeigh v. State of Florida*, 73 So.2d 694, *appeal dismissed* 348 U.S. 885 (1954); ILLINOIS: *People v. Carpenter*, 150 N.E.2d 100 (1958); INDIANA: *Noelke v. State*, 15 N.E.2d 950 (1938); LOUISIANA: *State v. Jenna*, 112 So. 655 (1927), *certiorari denied*, 275 U.S. 522 (1927); MASSACHUSETTS: *Commonwealth v. DiStasio*, 1 N.E.2d 189 (1936); SOUTH CAROLINA: *State v. Myers*, 67 S.E.2d 506 (1951); UTAH: *State v. Cerar*, 207 P. 597 (1922); WISCONSIN: *Jessner v. State*, 231 N.W. 634 (1930); WYOMING: *State v. Riggle*, 298 P.2d 349 (1956).

> the fact that he committed the crime, but solely to determine his mental capacity . . ."

and concluded that the authorities could not, in the future, over the protest of the defendant, reveal any confession made to them during the course of their mental examination.

In *State v. Cerar*, supra, the Supreme Court of the State of Utah was confronted with this same question and made the following observation at page 602:

> "It certainly would be strange doctrine to presume one judged with a public offense to put in issue his want of mental capacity to commit the offense, and in order to make his plea of want of capacity invulnerable prevent all inquiry into his mental state or condition."

Professor Wigmore at page 533 of the Third Edition of his distinguished treatise on the Law of Evidence makes the following comment:

> "Another analogous modern reform reducing measurably the controversial uncertainty of expert testimony at criminal trials where insanity is pleaded is the provision requiring examination of the accused before trial by psychiatrists, one or more to be designated by the court, the committal of the party to a state institution for observation, and the report to be admissible."

On June 1, 1965, the Supreme Court of the State of New Jersey decided *State of New Jersey v. Whitlow*, 45 N.J. 3 (1965). The opinion of that Court was written by Mr. Justice J. J. Francis and he was speaking for a unanimous court. This most able and distinguished opinion grapples with the very problem with which the Court is here concerned.

In the *Whitlow* case, the defendant was charged with a homicide and had entered a plea of mental incompe-

tency to stand trial and insanity at the time of the commission of the offense. The defendant had been examined by a psychiatrist of his own selection, and thereafter, but preceding trial, the prosecutor of Cape May County sought an order for a similar examination on behalf of the state. In the lower court, the defendant resisted the examination on the grounds of self-incrimination, but the lower court directed the examination nevertheless. On appeal, two questions of novel impression were presented for adjudication:

1) In criminal cases where the defendant pleads mental inability to stand trial or that he is innocent of criminal blame because he was insane at the time of the offense, is his right to freedom from self-incrimination invaded by a court order authorizing psychiatric examination and directing him to answer their questions relating to the offense, if such are necessary?

2) Whether the refusal to allow defense counsel to be present at the time of the examination violates his right to the assistance of counsel under the Sixth Amendment to the Constitution of the United States?

The Supreme Court of New Jersey first makes note of the fact that in the usual situation where defense counsel informs the prosecution or the Court of his client's mental incapacity for trial or for criminal responsibility, it might be assumed that defense psychiatrists have already examined the defendant and furnished an expert opinion supporting that statement. Justice Francis then goes on at page 767:

> "In such case manifestly the state should be permitted to have a similar examination made by psychiatrists of its choosing. It would be most anomalous to say that a defendant may advance the defense of insanity, have himself examined by his own experts and then invoke the constitutional guarantee against self-incrimination for the purpose of preventing examination by the state. . . . To allow the accused to obtain his own expert, and after a private

and unlimited conference with him and examination by him; to plead insanity, and then put forward the privilege against self-incrimination to frustrate like activities by the prosecution is to balance the competing interests unfairly and disproportionately against the public."

The Court makes note of the fact that the scope of the examination is the area which presents the greatest difficulty and observes that the results of an ordinary physical and psychological examination, including interrogation, are admissible. The difficult question lies in a determination of whether or not inculpatory statements or confessions made during the psychiatric interview may be introduced into evidence. The highest court of the State of New Jersey had declared that where interrogation on such points is necessary in order that the physicians might form an opinion as to mental capacity to stand trial or to commit the crime, such statements or confessions are admissible. Their function or probative force, however, is limited to the sanity issue and may not be used as substantive evidence of guilt. It is submitted that this is a sound, logical, and just result.

The Supreme Court of New Jersey concluded with the following observation at page 770:

"In our judgment a rule which requires a defendant who pleads mental incapacity to stand trial or legal insanity at the time of the crime, to submit to a psychiatric examination and to answer all questions deemed necessary by the examiner to enable him to form an expert opinion on the issues, is valid constitutionally so long as it is subject to the qualifications outlined above. An accused who asserts lack of criminal guilt because of insanity and who fully cooperates with psychiatrists engaged by him for examination purposes, answering all questions put to him including those relating to the crime itself, ought not to be allowed to frustrate a similar comprehen-

sive examination by the State by asserting the bar against self-incrimination. He ought not to be able to advance the claim and then make the rules for determination of the claim."

It is to be observed that Justice Francis considered the possibility of a motion for a mental examination being filed prior to formal arraignment. He very perceivingly suggested the following reasonable procedure at page 772:

"Since no one questions that the psychiatric interview is a crucial diagnostic tool, the judicial aim must be to make it an effective instrument of justice. How can this be accomplished and defendant's Fifth Amendment rights safeguarded when he has been arrested on a complaint or indictment charging homicide? . . . First, assuming defendant has not yet been arraigned and the possibility of mental incompetency to stand trial or legal insanity at the time of perpetration of the killing is projected, what course should be taken? . . . The defense counsel, whether appointed or privately engaged, should be given notice of an application (at a short date if necessary) by the State for designation of a psychiatrist to make an examination. At the argument of the motion the parties may authorize the court to select one or more impartial doctors to examine. Obviously a desirable objective in such matters is to eliminate as much as possible the so-called battle of experts at a hearing or trial."

The Court is asked to take note that the District Attorney of Montgomery County has filed the instant Petition under the Mental Health Act of 1951, as amended, and in no way, suggested either directly or indirectly the identity of the members of the Commission.

At page 775, again with reference to the self-incrimination argument, Justice Francis in the *Whitlow* case made the following comment:

"We perceive the difficulties attending the State's effort to meet a claim of insanity, particularly at the time of trial where the allegation is offered to show lack of criminal responsibility for the offense. The State cannot be left helpless to meet the defense, and the imposition of reasonable conditions on its presentation ought not be deemed barred by the privilege against self-incrimination."

One of the most formidable and profound works of its kind is the Model Penal Code prepared under the auspices of the American Law Institute. Section 4.05 thereof provides for the case where the defendant has indicated an intention to rely on the defense of mental disease or where there is doubt as to the defendant's fitness to proceed, or there is reason to believe that mental disease or defect of the defendant will otherwise become an issue in the case. In such case it provided that the court shall appoint at least one qualified psychiatrist to examine and report upon the mental condition of the defendant. Generally accepted methods of the medical profession may be employed, and the examining physician thereafter submits a report of his examination with the court in triplicate, copies to be delivered to the district attorney and to counsel for the defendant.

The next following section of the Model Penal Code provides that if the report of the examining psychiatrist is uncontested, the court will make a determination on the basis of the report. On the other hand, if there is a contest, the report is received in evidence and the objecting party has the right to cross-examine the psychiatrist submitting the report and to offer evidence upon the issue. Thereafter, the court makes an adjudication.

Section 4.07 specifically provides that the psychiatrist who has examined the defendant shall be permitted to make a statement as to the nature of his examination, his diagnosis of the mental condition of the defendant, his capacity to appreciate the criminality of his conduct and to make such explanation clarifying the same as may be required.

Finally, to apply the exclusionary rule to the present type of situation appears to serve no useful purpose and, in fact, would only hinder the inquiry into the competency of the defendant, an inquiry which may benefit the defendant as much as any other party. *In re Martinez*, 463 P.2d 734 (1970).

CONCLUSION

The Commonwealth respectfully requests that the orders of the Criminal Courts of Montgomery County and the Supreme Court of Pennsylvania be affirmed and thereby insure the future care and treatment of the defendant and the protection of the remaining persons on the defendant's death list and future unknown victims.

Respectfully submitted,

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